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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT S. KOSLOFF

CASE NO. C 04-00566 JCS
Civil Rights

Plaintiff,

v.

DAVID SHARRETT, individually
and dba DEVINO'S PASTA & PIZZA;
THOMAS R. LILE, JR. and KAREN J.
LILE, as Trustees Under That Certain
Agreement Dated October 1, 1973, as
Amended; and DOES 1-25, Inclusive,

**COMPLAINT FOR PRELIMINARY AND
PERMANENT INJUNCTIVE RELIEF AND
DAMAGES: DENIAL OF CIVIL RIGHTS
AND PUBLIC FACILITIES TO
PHYSICALLY DISABLED PERSONS, (§54,
§54.1, §55 CIVIL CODE; §19955 ff HEALTH
& SAFETY CODE); INJUNCTIVE RELIEF
PER TITLE III, AMERICANS WITH
DISABILITIES ACT OF 1990**

DEMAND FOR JURY TRIAL

Defendants.

/

Plaintiff ROBERT S. KOSLOFF complains of Defendants above named, and each of them, and alleges as follows:

**FIRST CAUSE OF ACTION: DAMAGES AND INJUNCTIVE RELIEF
FOR DENIAL OF FULL AND EQUAL ACCESS TO A PUBLIC
ACCOMMODATION: PUBLIC FACILITIES IN A PUBLIC ACCOMMODATION
(§§19955 Et. Seq., Health & Safety Code, §54.1 Civil Code)**

1. Plaintiff Robert S. Kosloff is a "person with a disability" or "physically handicapped person."¹ Plaintiff Robert S. Kosloff requires the use of a wheelchair for locomotion and is unable

¹(Hereinafter, the words "physically handicapped" and "physically disabled" are used interchangeably as these words have similar or identical common usage and legal meaning, but the legislative scheme in Part 5.5 Health & Safety Code uses the term "physically handicapped persons," and the statutes protecting "Blind and other physically disabled persons," §§54, 54.1, 54.3 and 55 Civil Code and other statutory measures refer to the protection of the rights of "individuals with disabilities.")

1 to use portions of public facilities which are not accessible to disabled persons who require the use
 2 of a wheelchair.

3 2. **SUMMARY:** This case involves the denial of parking, path of travel, entrance,
 4 restrooms and related facilities to Plaintiff Kosloff and other disabled persons at Devino's Pasta &
 5 Pizza Restaurant and the shopping center of which it is a part at 2221-2243 Morello Avenue ,
 6 Pleasant Hill, California. Plaintiff Kosloff was denied equal protection of the law and was denied
 7 Civil Rights under both California law and federal law. Plaintiff was denied his rights to full and
 8 equal access at the restaurant and shopping center and, most humiliatingly, the public restroom
 9 facilities, because the restaurant, center, and its facilities were not properly accessible to disabled
 10 persons such as Plaintiff who use wheelchairs. Plaintiff seeks **injunctive relief** to require
 11 Defendants to make these specified facilities accessible to disabled persons and to ensure that any
 12 disabled person who attempts to use the public facilities in this restaurant and center will be
 13 provided accessible entry, proper accessible facilities, and proper access to usable sanitary facilities.
 14 Plaintiff also seeks recovery of **damages** for his personal damages and discriminatory experiences
 15 and seeks recovery of reasonable **attorneys' fees, litigation expenses and costs**, according to
 16 statute.

17 3. **JURISDICTION:** This Court has jurisdiction of this action pursuant to 28 USC
 18 §1331 for violations of the Americans with Disabilities Act of 1990, 42 USC 12101 *et seq.*
 19 Pursuant to pendant jurisdiction, attendant and related causes of action arising from the same facts
 20 are also brought under California law, including but not limited to violations of California
 21 Government Code §4450, *et. seq.*, Health & Safety Code §19955 *et seq.*, including §19959; Title
 22 24 California Code of Regulations; and California Civil Code §§ 54, 54.1 and 55.

23 4. **VENUE:** Venue is proper in this court pursuant to 28 USC 1391(b) and is
 24 founded on the fact that the real property which is the subject of this action is located in this district
 25 and that Plaintiff's causes of action arose in this district.

26 5. **INTRADISTRICT:** This case should be assigned to the San Francisco intradistrict
 27 as the real property which is the subject of this action is located in said intradistrict and Plaintiff's
 28 causes of action arose in said intradistrict.

1 6. Defendants above named, and each of them, and DOES 1-5, Inclusive, are the
 2 owners, operators, lessors, lessees, franchisors, and franchisees of the property, premises, and
 3 restaurant. This building is a "public accommodation or facility" subject to the requirements of
 4 California Health & Safety Code §19955 et seq. and of the California Civil Code, §54, et seq. On
 5 information and belief, such facility has, since July 1, 1970, either been constructed or undergone
 6 "alterations, structural repairs, or additions" subjecting such restaurant to disabled access
 7 requirements per sections 19955-19959 Health & Safety Code.

8 7. The true names and capacities of Defendants DOES 1 through 25, Inclusive, are
 9 unknown to Plaintiff who therefore sues said Defendants by such fictitious names; Plaintiff is
 10 informed and believes that each of the Defendants herein designated as a DOE is legally responsible
 11 in some manner for the events and happenings herein referred to and caused injury and damages
 12 proximately thereby to Plaintiff. Plaintiff prays leave of Court to amend this Complaint to show
 13 such true names and capacities when the same have been ascertained.

14 8. Defendants above named, and each of them, and DOES 1-25, Inclusive, are and
 15 were the owners, operators, lessors, lessees, franchisors, and/or franchisees of the subject restaurant
 16 and shopping center of which it a part at all times relevant to this Complaint. Plaintiff is informed
 17 and believes that each of the Defendants herein is the agent, employee or representative of each of
 18 the other Defendants, and performed all acts and omissions stated herein within the scope of such
 19 agency or employment or representative capacity and is responsible in some manner for the acts and
 20 omissions of the other Defendants in proximately causing the damages complained of herein.

21 9. Plaintiff and other similarly situated physically disabled persons who require the
 22 use of a wheelchair are unable to use public facilities on a "full and equal" basis unless each such
 23 facility is in compliance with the provisions of the Health & Safety Code §19955 et. seq. Plaintiff
 24 is a member of that portion of the public whose rights are protected by the provisions of §19955
 25 et seq. Health & Safety Code. The acts and omissions of Defendants complained of herein were
 26 committed in Pleasant Hill, Contra Costa County, State of California.

27 10. §19955 Health & Safety Code was enacted "To ensure that public accommodations
 28 or facilities constructed in this state with private funds adhere to the provisions of Chapter 7

1 (commencing with §4450) of Division 5 of Title 1 of the Government Code." Such public
2 accommodations are defined to include restaurants and public accommodations. §19955 Health &
3 Safety Code also requires that, "When sanitary facilities are made available for the public, clients
4 or employees in such accommodations or facilities, they shall be made available for the physically
5 handicapped." Title 24, California Code of Regulations, formerly known as the California
6 Administrative Code, was in effect at the time of each alteration which, on information and belief,
7 occurred at such public facility since July 1, 1982, thus requiring access complying with the
8 specifications of Title 24 whenever each such "alteration, structural repair or addition" is carried
9 out. On information and belief, the original construction of the building and/or alterations,
10 structural repairs, or additions which additionally triggered access requirements also occurred
11 between July 1, 1970 and July 1, 1982, and required access pursuant to the A.S.A. (American
12 Standards Association) Regulations then in effect.

13 11. On July 14, 2003 Plaintiff and a friend and acquaintances were customers at the
14 subject restaurant. Plaintiff, who traveled by van to the restaurant and center, had to park in a
15 parking space that was not van accessible because the parking lot does not have a van accessible
16 space. Plaintiff encountered difficulty in proceeding from the parking lot to the restaurant because
17 the curb ramps have excessive slopes and an abrupt drop off and because there is not a properly
18 accessible path of travel to the building entrances. Once Plaintiff reached the entrance he
19 encountered difficulty in obtaining entry because the force to open the exterior door is excessive
20 and because the exterior door is narrow and lacks a 10" minimum high bottom rail. Plaintiff was
21 able to gain access to the interior of the restaurant, was seated with his friend, and had dinner. After
22 dinner, and in immediate physical need of a restroom, Plaintiff was directed to a rear door of the
23 restaurant which has no strike side clearance on the pull side of the door and which causes difficulty.
24 The rear door opens to a corridor which leads to a men's restroom in the core of the building.
25 Upon reaching the men/s room, Plaintiff found it difficult to gain entry and to maneuver in the
26 common restroom area because of the lack of proper space in the direction of the door swing, lack
27 of proper space in the restroom interior, and lack of proper path of travel width to the toilet stalls.
28 Upon reaching the allegedly "accessible" toilet stall, Plaintiff found that the toilet was totally

1 inaccessible to persons such as himself that require a wheelchair for mobility and who can only make
2 a “side transfer” from a wheelchair to a toilet. In addition, Plaintiff observed that it was not possible
3 for a wheelchair user such as himself to both enter the stall and close the door to the stall. Because
4 Plaintiff could not use the toilet in the men’s restroom, he was forced to depart immediately so as
5 to locate an accessible restroom elsewhere.

6 12. The property and facilities are not properly accessible to persons such as Plaintiff
7 who require the use of a wheelchair for mobility in other particulars as well, including but not
8 necessarily limited to a lack of proper disabled access signage, lack of accessible path of travel
9 from the public right of way to the building entrances, and lack of a properly accessible woman’s
10 restroom.

11 13. Further, any violation of the Americans With Disabilities Act of 1990, (as pled in the
12 Second Cause of Action hereinbelow, the contents of which are replied and incorporated herein,
13 word for word, as if separately replied), also constitutes a violation of §54(c) California Civil Code,
14 thus independently justifying an award of damages and injunctive relief pursuant to California law,
15 including but not limited to 54.3 and 55 Civil Code.

16 14. Further, any violation of the Americans With Disabilities Act of 1990, (as pled in the
17 Second Cause of Action hereinbelow, the contents of which are replied and incorporated herein,
18 word for word, as if separately replied), also constitutes a violation of §54.1(d) California Civil
19 Code, thus independently justifying an award of damages and injunctive relief pursuant to California
20 law, including but not limited to §§54.3 and 55 Civil Code.

21 15. **INJUNCTIVE RELIEF:** Plaintiff seeks injunctive relief to prohibit the above acts
22 and omissions of Defendants, which are continuing on a daily basis and have the effect of wrongfully
23 excluding Plaintiff and other members of the public who are physically disabled wheelchair users
24 from full and equal access to that restaurant. Such acts and omissions are the cause of humiliation
25 and mental and emotional suffering of Plaintiff in that these actions continue to treat Plaintiff as an
26 inferior and second class citizen and serve to discriminate against him on the sole basis that he is a
27 person with disabilities and requires the use of a wheelchair for movement in public places; Plaintiff
28 is unable, so long as such acts and omissions of Defendants continue, to achieve equal access to and

1 use of this public restaurant, center, and their facilities. The acts of Defendants have proximately
2 caused and will continue to cause irreparable injury to Plaintiff if not enjoined by this court.

3 **16. DAMAGES:** As a result of the denial of equal access to the restaurant and center
4 and due to the acts and omissions of Defendants and each of them in owning, operating, leasing,
5 franchising, constructing, altering, and maintaining the subject facility, Plaintiff suffered a
6 violation of his Civil Rights including but not limited to rights under §§ 54 and 54.1 Civil Code, and
7 suffered physical discomfort and pain, mental and emotional distress, embarrassment and
8 humiliation, all to his damages as hereinafter stated. Defendants' actions and omissions to act
9 constituted discrimination against Plaintiff on the sole basis that he was physically disabled and
10 unable, because of the architectural barriers created and/or maintained by the Defendants in violation
11 of the subject laws, to use the restaurant's and center's public facilities on a full and equal basis as
12 other persons. Plaintiff also seeks trebling of all actual damages, general and special, as provided
13 by §54.3 Civil Code.

14 **17. FEES AND COSTS:** As a result of Defendants' acts, omissions, and conduct,
15 Plaintiff Kosloff has been required to incur attorneys' fees, litigation expenses, and costs as provided
16 by statute, in order to enforce Plaintiff's rights and to enforce provisions of the law protecting access
17 for disabled persons and prohibiting discrimination against disabled persons. Plaintiff therefore
18 seeks recovery of all reasonable attorney's fees and costs, pursuant to the provisions of §54.3 Civil
19 Code. Additionally, Plaintiff's lawsuit is intended not only to obtain compensation for damages to
20 Plaintiff, but also to force the Defendants to make their facilities accessible to all disabled members
21 of the public, justifying "public interest" attorneys' fees, litigation expenses and costs pursuant to
22 the provisions of §1021.5 Code of Civil Procedure.

23 **18.** Wherefore Plaintiff Kosloff asks this court to preliminarily and permanently enjoin
24 any continuing refusal by Defendants to grant such access to Plaintiff and to require Defendants to
25 comply forthwith with the applicable statutory requirements relating to access for disabled persons.
26 Such injunctive relief is provided by §19953 Health & Safety Code and California Civil Code §55,
27 and other law. Plaintiff further requests that the court award damages, attorneys' fees, litigation
28 expenses and costs pursuant to Civil Code §54.3 and statutory costs, attorneys' fees, and litigation

1 expenses pursuant to §19953 Health & Safety Code, Civil Code §55, Code of Civil Procedure
 2 §1021.5 and other law, all as hereinafter prayed for.

3 Wherefore Plaintiff prays for relief as hereinafter stated:

4 **SECOND CAUSE OF ACTION:**
 5 **VIOLATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990**
 6 **42 USC §12101FF**

7 19. Plaintiff repleads and incorporates by reference, as if fully set forth again herein, the
 8 allegations contained in Paragraphs 1 through 18 of this Complaint, and incorporates them herein
 as if separately replied.

9 20. Pursuant to law, in 1990 the United States Congress made findings per 42 USC
 10 §12101 regarding physically disabled persons, finding that laws were needed to more fully protect
 11 "some 43 million Americans [with] one or more physical or mental disabilities;" that "historically
 12 society has tended to isolate and segregate individuals with disabilities;" that "such forms of
 13 discrimination against individuals with disabilities continue to be a serious and pervasive social
 14 problem;" that "the Nation's proper goals regarding individuals with disabilities are to assure
 15 equality of opportunity, full participation, independent living and economic self sufficiency for such
 16 individuals;" and that "the continuing existence of unfair and unnecessary discrimination and
 17 prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue
 18 those opportunities for which our free society is justifiably famous. . . ."

19 21. Congress stated as its purpose in passing the Americans with Disabilities Act (42
 20 USC §12101(b))

21 It is the purpose of this act

- 22 (1) to provide a clear and comprehensive national mandate for the elimination of
 discrimination against individuals with disabilities;
- 23 (2) to provide clear, strong, consistent, enforceable standards addressing discrimination
 against individuals with disabilities;
- 24 (3) to ensure that the Federal government plays a central role in enforcing the standards
 established in this act on behalf of individuals with disabilities; and
- 25 (4) to invoke the sweep of Congressional authority, including the power to enforce the 14th
 Amendment and to regulate commerce, in order to address the major areas of discrimination
faced day to day by people with disabilities. (Emphasis added)

26 22. As part of the Americans with Disabilities Act, Public Law 101-336, (hereinafter the

1 "ADA"), Congress passed "Title III - Public Accommodations and Services Operated by Private
 2 Entities" (42 USC 12181ff). Among "private entities" which are considered "public
 3 accommodations" for purposes of this title are a "... a restaurant, bar or other establishment serving
 4 food or drink." (§301(7)(B)).

5 23. Pursuant to §302, 42 USC §12182, "No individual shall be discriminated against on
 6 the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges,
 7 advantages, or accommodations of any place of public accommodation by any person who owns,
 8 leases, or leases to, or operates a place of public accommodation."

9 24. Among the specific prohibitions against discrimination were included:
 10 §302(b)(2)(A)(ii): "A failure to make reasonable modifications in policies, practices or procedures
 11 when such modifications are necessary to afford such goods, services, facilities, privileges,
 12 advantages or accommodations to individuals with disabilities...;"
 13 §302(b)(2)(A)(iii): "a failure to take such steps as may be necessary to ensure that no individual
 14 with a disability is excluded, denied service, segregated, or otherwise treated differently than other
 15 individuals because of the absence of auxiliary aids and services...;"
 16 §302(b)(2)(A)(iv): "A failure to remove architectural barriers, and communication barriers that are
 17 structural in nature, in existing facilities... where such removal is readily achievable;"
 18 §302(b)(2)(A)(v): "Where an entity can demonstrate that the removal of a barrier under clause (iv)
 19 is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages,
 20 or accommodations available through alternative methods if such methods are readily achievable."
 21 The acts and omissions of Defendants set forth herein were in violation of Plaintiff's rights under
 22 the ADA, Public Law 101-336, and the regulations promulgated thereunder, 28 CFR Part 36ff.

23 25. The removal of each of the barriers complained of by Plaintiff Kosloff as
 24 hereinabove alleged, were at all times herein mentioned "readily achievable" under the standards of
 25 the Americans With Disabilities Act. As noted hereinabove, removal of each and every one of the
 26 architectural barriers complained of herein were also required under California law.

27 26. On information and belief, as of the date of Plaintiff's visit to the restaurant and
 28 center, and as of the date of the filing of this Complaint, the premises denied full and equal access

1 to Plaintiff and to other disabled wheelchair users in other respects, which violated Plaintiff's rights
2 to full and equal access and which discriminated against Plaintiff on the basis of his disability, thus
3 wrongfully denying to Plaintiff the full and equal enjoyment of the goods, services, facilities,
4 privileges, advantages and accommodations, in violation of §302 of the ADA, 42 USC §12182.

5 27. Pursuant to the Americans with Disabilities Act, 42 USC 12188ff, §308, Plaintiff is
6 entitled to the remedies and procedures set forth in §204(a) of the Civil Rights Act of 1964, 42 USC
7 2000(a)-3(a), as Plaintiff is being subjected to discrimination on the basis of disability in violation
8 of this title or has reasonable grounds for believing that he is about to be subjected to discrimination
9 in violation of §302. On information and belief, Defendants have continued to violate the law and
10 deny the rights of Plaintiff and of other disabled persons to access this public accommodation since
11 on or before plaintiff's encounter. Pursuant to §308(a)(2), "In cases of violations of
12 §302(b)(2)(A)(iv)... injunctive relief shall include an order to alter facilities to make such facilities
13 readily accessible to and usable by individuals with disabilities to the extent required by this title."

14 28. Plaintiff seeks relief pursuant to remedies set forth in §204(a) of the Civil Rights Act
15 of 1964, (42 USC 2000(a)-3(a), and pursuant to Federal Regulations adopted to implement the
16 Americans with Disabilities Act of 1990. Plaintiff is a person for purposes of Section 308(a) of the
17 ADA who is being subjected to discrimination on the basis of disability in violation of Title III and
18 who has reasonable grounds for believing he will be subjected to such discrimination each time that
19 he may attempt to use the Restaurant.

20 Wherefore Plaintiff prays for relief as hereinafter stated:

PRAYER

22 1. Issue a preliminary and permanent injunction directing Defendants as current owners
23 and operators of the subject restaurant to modify the above described restaurant, center, and related
24 facilities so that each provides adequate access to all citizens, including persons with disabilities; and
25 issue a preliminary and permanent injunction directing Defendants to provide facilities usable by
26 plaintiff and similarly situated persons with disabilities, and which provide full and equal access, as
27 required by law; and that Defendants be prohibited from operating this restaurant and center as a
28 public accommodation until such access for disabled persons is provided.

2. Retain jurisdiction over the Defendants until such time as the Court is satisfied that Defendants' unlawful policies, practices, acts and omissions, and maintenance of inaccessible public facilities as complained of herein no longer occur, and will not recur;

3. Award to Plaintiff all appropriate damages, including but not limited to statutory damages and general damages in an amount within the jurisdiction of the Court;

4. Award to Plaintiff all reasonable attorneys' fees, all litigation expenses, and all costs of this proceeding as provided by law; and

5. Grant such other and further relief as this Court may deem just and proper.

Dated: 2/10/04

SIDNEY J. COHEN
PROFESSIONAL CORPORATION

/s/ Sidney J. Cohen

By Sidney J. Cohen
Attorney for Plaintiff Robert S. Kosloff

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury for all claims for which a jury is permitted.

Dated: 2/10/04

SIDNEY J. COHEN
PROFESSIONAL CORPORATION

/s/ Sidney J. Cohen

By Sidney J. Cohen
Attorney for Plaintiff Robert S. Kosloff

CERTIFICATION OF INTERESTED PARTIES

Pursuant to Civil Local Rule 3-16, the undersigned certifies that as of this date, other than the named parties, there is no interest to report.

Dated: 2/10/04

SIDNEY J. COHEN
PROFESSIONAL CORPORATION

/s/ Sidney J. Cohen

By _____
Sidney J. Cohen
Attorney for Plaintiff

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